IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-685

DRESSER INDUSTRIES, INC., A CORPORATION, ON ITS OWN BEHALF AND ON BEHALF OF CERTAIN DRESSER EMPLOYEES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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The Petitioner, Dresser Industries, Inc., respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review the decision and opinion of that court, which on June 13, 1979, affirmed the ruling of the United States District Court for the Southern District of Texas dismissing an action commenced by Dresser to enforce an agreement breached by the Government of the United States of America (Government).

PREFATORY NOTE.

This Petition is submitted to this Honorable Court by Dresser Industries, Inc., on its own behalf and on behalf of certain Dresser employees and their families. Dresser has thus far been denied an effective opportunity to assert its own rights and those of its employees to enforce a commitment of the Government to preserve the confidentiality of certain information, which if publicly disseminated, would jeopardize the well-being of those Dresser employees and their families living and traveling abroad. Therefore, Dresser, on behalf of those employees and their families who do not have the benefit of Constitutional safeguards, petitions this Court to preserve the confidentiality of that information which, because of the Government's repudiation of its prior commitment of confidentiality, is subject to immediate disclosure.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit affirming the dismissal of Dresser's lawsuit is reported at 596 F. 2d 123 (5th Cir. 1979), (App. A). The decision of the United States District Court for the Southern District of Texas is unreported (App. B).

JURISDICTION.

The opinion of the Court of Appeals for the Fifth Circuit affirming dismissal of Dresser's lawsuit was entered on June 13, 1979. A petition for rehearing en banc was subsequently filed on June 27, 1979, and denied on July 30, 1979. The petition for writ of certiorari is filed within 90 days of July 30, 1979. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Whether Dresser is entitled to enforce a commitment extended by the Government to Dresser as an inducement to participation in the SEC Voluntary Disclosure Program, which has expressly repudicated its obligations thereunder; and

Whether the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit erred in finding that Dresser's suit to enforce the government's commitment was not ripe for judicial determination although the Government has breached its commitment and has expressly repudiated its obligations thereunder; and

Whether Dresser has standing to bring suit on behalf of those Dresser employees threatened by government misconduct but unable to assert their own rights effectively under the Privacy Act.

STATUTES AT ISSUE.

5 U. S. C. § 552(a).

STATEMENT OF THE CASE.

Petitioner Dresser Industries, Inc., (Dresser) requests review of the decision of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Southern District of Texas dismissing Dresser's complaint to enforce a commitment extended by the Government to Dresser as an inducement to participation in the SEC Voluntary Disclosure Program, which commitment has been breached by the Government.

In June of 1974 the SEC, pursuant to the discovery of certain questionable payments abroad by U. S. companies, instituted what was to become known as the Voluntary Disclosure Program. This program was initiated by the SEC for the express purpose of determining the existence and extent of such payments through the voluntary assistance of participating U. S. companies. The success of this program was contingent upon the cooperation of U. S. companies, and the SEC therefore urged companies to come forward and participate voluntarily in its program. At the outset of the program, the SEC acknowledged a threat to the well-being of U. S. nationals living and traveling abroad in the event of an arbitrary disclosure of that sensitive information complied under the program.[1]

1. "The unfortunate by-product of [detailed disclosure] *would be harmful to many people . . . even lives might be threatened.*

* * * * *

"It seems to me that an investor can be told all he really needs in assessing an investment or a proposal without compelling disclosure of information that may have the unfortunate impacts I have suggested. If the Commission can develop such a mode of disclosure, then I think corporations may begin cleaning out their houses voluntarily and without the impetus of a Commission investigation.

* * * * *

(Footnote continued on next page.)

It was with this professed concern for the safety of U. S. citizens that members of the SEC staff in January of 1975 met with Dresser representatives to discuss the possibility of Dresser's participation in the Voluntary Disclosure Program. At this meeting Dresser expressed grave concern for the well-being of those employees and their families whose identities might be disclosed as a result of Dresser's participation in the program, thereby subjecting them to reprisal at the hands of foreign nationals. In response to Dresser's concerns, the then Director of the SEC's Division of Corporate Finance assured Dresser that the confidentiality of that information compiled by Dresser pursuant to participation in the program would be preserved. The SEC subsequently made a more definite commitment wherein specific procedures to assure complete confidentiality were agreed upon. In addition to these assurances to Dresser, the SEC made certain public pronouncements committing itself to the confidentiality of information obtained under the program. Dresser was never informed by the SEC that the confidentiality of that information derived from its participation in the Voluntary Disclosure Program would not be preserved, or that the SEC would refer Dresser's investigative file, as well as those of all other volunteers, to the Department of Justice for investigation and possible criminal prosecution.

Pursuant to its reliance upon the SEC's assurance of confidentiality, Dresser agreed to participate in the Voluntary Disclosure Program. Dresser subsequently promulgated a policy condemning sensitive payments and undertook an exhaustive in-house investigation to ascertain the existence and nature of any

(Footnote continued from preceding page.)

"but the company may omit information such as recipients, countries where payments were made and other damaging details *which would relate* only peripherally to the interest of investors . . . I am confident that the combined ingenuity of businesses, their auditors and counsel, and our staff can solve these problems." [Emphasis added.] SEC Commissioner Sommer, July 21, 1975.

sensitive payments. This investigation resulted in the discovery of certain payments to foreign nationals, a number of which had been made as a consequence of extortionate threats to Dresser employees. The results of Dresser's in-house investigation, as required under the Voluntary Disclosure Program, were subsequently reported to the SEC. The SEC, however, after receiving Dresser's full cooperation in its program, demanded unrestricted access to *all* information compiled during the course of Dresser's in-house investigation. The SEC also advised Dresser that it would not honor its prior commitments, but would instead aggressively pursue its own investigation without regard for the confidentiality of that information voluntarily compiled by Dresser.

Because of the SEC's refusal to honor its prior commitment, Dresser refused to grant the SEC access to its files. Dresser did, however, attempt to reach an alternative arrangement with the SEC whereby access might be permitted under conditions that would assure that confidentiality previously guaranteed by the SEC. On July 15, 1977, and again on November 28, 1977, Dresser attempted unsuccessfully to resolve the differences precipitated by the SEC demands. While Dresser was endeavoring to resolve this dispute, the SEC, in August of 1977, and without prior notice to Dresser, referred Dresser's investigative file to the Department of Justice for further investigation and possible criminal prosecution.

Because of the SEC's repudiation of its commitment and its referral of Dresser's file to the Department of Justice, Dresser filed suit on March 3, 1978, in the United States District Court for the Southern District of Texas, against the Department of Justice and the SEC, seeking to enforce the government's commitment. The jurisdiction of the United States District Court for the Southern District of Texas, Houston Division, was established pursuant to 28 U. S. C. § 1331, and 28 U. S. C. § 1337. On April 18, 1978, the Department of Justice caused a Grand Jury subpoena to be issued and served upon Dresser

demanding the production of Dresser's files. On April 21, 1978, the SEC also issued a subpoena to Dresser demanding the production of that confidential information compiled pursuant to Dresser's participation in the Voluntary Disclosure Program. In response to these subpoenae, Dresser filed a petition for preliminary injunctive relief seeking to enjoin the SEC and the Department of Justice from compelling production of these documents pending a resolution of the action previously filed by Dresser. On May 1, 1978, the United States District Court for the Southern District of Texas, without providing a hearing, denied Dresser's petition, and dismissed Dresser's complaint against the Department of Justice, finding that Dresser's lawsuit was not ripe for determination. A notice of appeal from the order of the District Court for the Southern District of Texas was filed on May 2, 1978.

The SEC subsequently filed a motion to dismiss Dresser's complaint. On May 26, 1978, the district court granted the SEC's motion and dismissed Dresser's complaint. In rendering its decision, the district court concluded that Dresser's lawsuit was not ripe for judicial determination and that Dresser was not entitled to enforce the SEC's commitment. The district court based its ruling upon the erroneous belief that Dresser could either (1) prosecute a "Reverse FOIA" action prior to the release of Dresser's investigations by the SEC, or (2) assert its rights in the limited context of a summary subpoena enforcement proceeding in the District of Columbia. A notice of appeal from the district court's order of May 26, 1978, was immediately filed on May 26, 1978. On Dresser's own motion, the Court of Appeals for the Fifth Circuit consolidated these two appeals.

On June 13, 1979, the United States Court of Appeals for the Fifth Circuit rendered a decision affirming the dismissal of Dresser's complaint. In its opinion, the Court of Appeals for the Fifth Circuit found, *inter alia*, that Dresser's action was not ripe for judicial determination since the Government had taken

no final action to compel the production of that confidential information that Dresser sought to protect. The court of appeals also found that Dresser did not have standing to raise and litigate those rights granted to its employees and their families under the Privacy Act.

A petition for rehearing en banc was filed on June 27, 1979, and denied on July 30, 1979. The error of the Court of Appeals for the Fifth Circuit in refusing to enforce the government's commitment requires that Dresser seek this Court's review to resolve the conflicts precipitated by the opinion herein.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING DRESSER'S RIGHT TO ENFORCE THE GOVERNMENT'S COMMITMENT IS IN CONFLICT WITH APPLICABLE AUTHORITY ESTABLISHED BY THIS COURT, THE DECISIONS OF SEVERAL CIRCUITS, AND THE PREVAILING CASE LAW WITHIN THE FIFTH CIRCUIT.

The Court of Appeals for the Fifth Circuit has denied Dresser the right to enforce a commitment extended to Dresser and now breached by the Government. In its complaint filed in the District Court for the Southern District of Texas, Dresser set forth the existence of a commitment, the breach of that commitment by the Government, and the harm resulting therefrom. The district court dismissed this complaint, which dismissal was affirmed by the Court of Appeals for the Fifth Circuit, which found that Dresser could not pursue redress for the government's misconduct. The Court of Appeals for the Fifth Circuit found that since Dresser's lawsuit was filed against an agency of the United States, Dresser was precluded from pursuing relief and might only raise the government's breach if the Government should initiate proceedings against Dresser. Notwithstanding the SEC's repudiation of its commitment after securing Dresser's full participation in the Voluntary Disclosure Program, the Court of Appeals for the Fifth Circuit held that Dresser could not maintain an action to enforce the government's commitment, nor take any action whatsoever to protect those rights violated by the Government. The decision of the Court of Appeals for the Fifth Circuit therefore shields the Government from accountability, and condones the government's misconduct while rendering a party aggrieved by such misconduct powerless to

protect those rights that the Government has chosen to disregard. Therefore Dresser respectfully suggests that the decision of the court of appeals in is conflict with the applicable authority established by this Court and the several circuits recognizing the right of relief for a party aggrieved by government misconduct.

A. The Decision of the Court of Appeals for the Fifth Circuit Conflicts with the Decision of the Court of Appeals for the Eighth Circuit in United States v. Minnesota Mining & Manufacturing Co.

The opinion of the Court of Appeals for the Fifth Circuit in the instant case is in direct conflict with the prevailing law in the Eighth Circuit established in *United States* v. *Minnesota Min. & Mfg. Co.*, 551 F. 2d 1106 (8th Cir. 1977). In *Minnesota Mining* the Court of Appeals for the Eighth Circuit, adhering to the principles established in *Santobello* v. *New York*, 404 U. S. 257 (1971) held that a promise by the Government was enforceable. In *Minnesota Mining*, the Watergate Special Prosecutor investigating illegal political contributions issued a press release encouraging corporations to advise his office voluntarily of any illegal political contributions. The prosecutor concurrently indicated that " 'the corporation's voluntary acknowledgement will be considered as a mitigating circumstance in deciding what charges to bring.' " 551 F. 2d 1106, 1109. Minnesota Mining voluntarily disclosed certain campaign payments with the understanding that only misdemeanor charges would be brought by the prosecutor. Despite this agreement, an indictment for tax violations was subsequently returned by the Government. The defendants filed a motion to dismiss the indictment based upon the government's prior agreement. After entertaining extended testimony concerning the prosecution's agreement, the District Court for the District of Minnesota found that the defendants had been led to believe that no further

charges would be filed. The district court therefore dismissed the indictments.

An appeal was taken by the Government, which argued that there had been no promise not to prosecute the defendants. The court of appeals, based upon its review of the testimony adduced before the district court, concluded that the defendants were entitled to assume that their voluntary disclosures and subsequent agreement with the prosecution were "dispositive of all federal criminal matters." 551 F. 2d 1106, 1111. The opinion of the Court of Appeals for the Eighth Circuit also considered the defendants' rights under the prosecutor's agreement. Distinguishing the case before it from a criminal plea bargain, the Court of Appeals for the Eighth Circuit noted that the Government had induced corporations to "come forth and admit to and document illegal campaign contributions," 551 F. 2d 1106, 1112, and that defendants had voluntarily agreed to participate in the government's disclosure program. On this point, the Court of Appeals for the Eighth Circuit stated as follows:

> "Here, *the Government urged corporations to voluntarily come forth and admit to and document illegal campaign contributions with the promise that such voluntary action might mitigate their criminal liability*. 3M officials accepted this governmental overture and proceeded to fully divulge the nature and extent of their illegal activity. As we have indicated, the agreement between 3M and the Government contained a promise that the Government would forego future criminal prosecution of 3M and its officials for all matters arising out of the illegal political contribution scheme. This was not a traditional plea bargain arrangement in which the trial judge was a participant. Rather, it was a prosecutorial agreement, the inviolability of which rested completely in the province of the government prosecutors, who have the sole power and responsibility to institute criminal proceedings. *Cf. United States* v. *Hammerman*, 528 F.2d 326, 332 (4th Cir. 1975)." (Emphasis added.) 551 F. 2d 1106, 1112.

After recognizing the nature of the government's agreement, the Court of Appeals for the Eighth Circuit concluded that the

Government had breached its promise and that the dismissal of the indictments was proper. The court of appeals noted:

> "The Government breached this promise by returning the present indictment against defendants. The remedy for the breach of this promise rests in the discretion of the trial court, *see Santobello* v. *New York*, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and under the circumstances of this case we cannot say that the remedy of dismissing the indictment was either undue or an abuse of discretion." 551 F. 2d 1106, 1112.

See also United States v. *Phillips Petroleum Company*, 435 F. Supp. 622 (N. D. Okla. 1977).

Unlike *United States* v. *Minnesota Min. & Mfg. Co.*, 551 F. 2d 1106, in the instant case the Government did not imply a promise but rather made an express commitment to preserve the confidentiality of certain information compiled by Dresser pursuant to its participation in the Voluntary Disclosure Program. Dresser, like the defendants in *Minnesota Mining*, came forward, participated in the government's program, and voluntarily disclosed incriminating information. Under the holding in *Minnesota Mining*, Dresser is clearly entitled to assert the government's commitment and obtain appropriate relief. However, the Court of Appeals for the Fifth Circuit has ignored the holding in *Minnesota Mining* and denied Dresser an effective opportunity to enforce that commitment relied upon by Dresser as an inducement to its participation in the Voluntary Disclosure Program. As a result of the decision of the court of appeals, a party aggrieved by a government breach of agreement is entitled to neither a forum nor to redress in the Fifth Circuit, while that same party may pursue and obtain relief in the Eighth Circuit. The decision of the Court of Appeals for the Fifth Circuit establishes a conflict that cannot be reconciled with the precedents of this Court and the decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Minnesota Min. & Mfg. Co.*, 551 F. 2d 1106. Therefore the conflict created by the opinion of the Court of Appeals for the Fifth

Circuit in the instant case, and the countervailing authority in the Eighth Circuit, necessitates review by this Court.

B. The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict with Its Prior Decision in Geisser v. United States Recognizing a Party's Right to Enforce a Government Promise.

In rendering its decision, the Court of Appeals for the Fifth Circuit also created a significant conflict of authority within the Fifth Circuit by ignoring those principles previously established in *Geisser* v. *United States*, 513 F. 2d 862 (5th Cir. 1975), and *Geisser* v. *United States*, 554 F. 2d 698 (5th Cir. 1977), thereby implicitly overruling these prior decisions. As a consequence, two conflicting bodies of law now exist in the Fifth Circuit, one recognizing a party's right to enforce a government promise, and the other denying this right. The conflict created by the decision of the court of appeals in the instant case therefore warrants review by this Court.

In *Geisser* v. *United States*, 513 F. 2d 862, the Court of Appeals for the Fifth Circuit reviewed the government's conduct relative to an agreement entered into by the petitioner and the Government as an inducement to obtain the petitioner's testimony against a co-conspirator. In return for the petitioner's favorable testimony, the Government agreed to exercise its "best efforts" to prevent the petitioner's extradition to Switzerland where she faced other charges. The petitioner complied with the terms of the agreement by providing testimony leading to the conviction of her co-conspirator. The petitioner thereafter began an agreed prison term, yet upon approaching the end of her second year of incarceration, learned that an order for her extradition had been obtained by the Swiss Government from the United States District Court for the Southern District of Florida. Fearing extradition, the petitioner filed suit in the Southern District of Florida to prevent extradition through enforcement of her plea agreement. The district court subsequently

found that the Government had failed to abide by the terms of its agreement concerning petitioner's extradition and therefore vacated its prior order of extradition.

An appeal was taken by the Government, which argued that it had not guaranteed the petitioner that she would not be extradited and that the petitioner's lawsuit was premature. Addressing these contentions, the Court of Appeals for the Fifth Circuit recognized that the primary issue before it was whether the petitioner could enforce the government's promise. The Court of Appeals for the Fifth Circuit noted as follows:

> "This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain made by the Department of Justice which assured the Government vital indispensable evidence. . . ." 513 F. 2d 862, 863.

The Court of Appeals for the Fifth Circuit held that the Government had agreed to exercise its best efforts to prevent the petitioner's extradition and that the Government had breached its commitment by not opposing the extradition proceedings initiated by the Swiss Government. Based upon this fact, the Court of Appeals for the Fifth Circuit chose to provide the Government had clearly "[gone] back on its word" by failing to The district court's order vacating the order of extradition was therefore vacated and the case remanded for further proceedings.

On remand, the Government again failed to exercise its best efforts, and the district court again determined that the Government had failed to fulfill its commitment to the petitioner. Consequently, the district court refused to order extradition and a further appeal was initiated by the Government. The Court of Appeals for the Fifth Circuit revisited its earlier decision and again pointed out that the Government had promised to exercise its best efforts to prevent the petitioner's extradition. The court of appeals then found, as had the district court, that the Government had clearly "[gone] back on its word" by failing to contest the extradition proceedings. Citing this Court's decision

in *Santobello* v. *New York*, 404 U. S. 257, the Court of Appeals for the Fifth Circuit found that the petitioner was entitled to enforce the government's agreement.

Dresser respectfully submits that the principles established by the Fifth Circuit in *Geisser* v. *United States*, 513 F. 2d 862, and 554 F. 2d 698, are controlling in the instant case. As in *Geisser*, the Government in the instant case has "[gone] back on its word" after receiving Dresser's full cooperation. Dresser participated in the Voluntary Disclosure Program based upon the government's assurances that the identities and locations of Dresser's employees and their families would remain confidential. After cooperating fully, and providing the Government with information derived through its in-house investigation, Dresser was informed by the Government that it did not choose to honor its prior commitment, but instead would require full and unrestricted disclosure of all information under circumstances that Dresser submits would result in dissemination of the information to the general public.[2]

Predicated upon the government's conduct, Dresser, like the petitioner in *Geisser*, filed suit to enforce the government's commitment. However, contrary to the result in *Geisser*, in this case Dresser was denied the right and an effective opportunity to enforce the government's commitment by both the district court and the Court of Appeals for the Fifth Circuit. Although confronted with circumstances similar to those in *Geisser*, the Court of Appeals for the Fifth Circuit ignored *Geisser* and found that Dresser, unlike a confessed felon, was not entitled to enforce the government's commitment. Rather, the Court of Appeals for the Fifth Circuit held that Dresser was precluded from enforcing the government's commitment since the Government, although in breach of its commitment, had not taken

2. The SEC has adopted a policy permitting access to files detailing questionable payments disclosed pursuant to the Voluntary Disclosure Program. *In the Matter of Requests of Jerry Landauer and John Berry*, April 28, 1977. Dresser is also aware of outstanding requests for SEC investigative files under the Freedom of Information Act.

action against Dresser. In so holding the court of appeals attached little, if any, significance to the government's breach, and instead characterized Dresser's action, not as a lawsuit to enforce the government's commitment, but as "pre-enforcement litigation," barred by the exhaustion doctrine.[3]

The Court of Appeals for the Fifth Circuit in affirming dismissal of Dresser's lawsuit has established conflicting standards with regard to recognition of a party's right to enforce a government promise. As a result of the court's opinion herein, an individual's right to enforce a government promise as recognized by the Fifth Circuit in *Geisser,* yet denied in the instant case, is jeopardized. The instant case therefore presents a significant conflict of authority justifying review by this Court.

C. The Decision of the Court of Appeals Is in Conflict with This Court's Holding in Santobello v. New York.

Dresser respectfully submits that in those instances where the government's conduct in dealing with a party has not met traditional standards of honesty and fairness, this Court has recognized the right of an aggrieved party to seek redress for the government's misconduct. However, the Court of Appeals for the Fifth Circuit has sanctioned the government's misconduct herein by denying Dresser an effective opportunity to hold the Government accountable for its actions. In *Santobello* v. *New York,* 404 U. S. 257, this Court recognized the rights of an individual to enforce a plea bargain with the Government, yet subsequently breached by the Government. This Court found that the prosecution's agreement, albeit with a confessed felon, was nonetheless enforceable by the aggrieved party. *See also United States* v. *Carter,* 454 F. 2d 426 (4th Cir. 1972); *United States* v. *Millet,* 559 F. 2d 253 (5th Cir. 1977).

The instant case involves neither criminal prosecution nor a plea bargain between a confessed felon and the prosecution.

3. 5 U. S. C. § 704.

Rather, it involves an agreement between the Government and Dresser under the terms of which the Government agreed, as a condition of Dresser's participation in the Voluntary Disclosure Program, to protect the confidentiality of certain information compiled by Dresser in its investigation. Having induced Dresser to participate voluntarily in this program, and having received Dresser's full cooperation, the Government has nonetheless repudiated its commitment and elected to disregard Dresser's concerns for the well-being of its employees. Because of the government's conduct, Dresser was compelled to seek judicial intervention to protect its employees. The district court, however, found that Dresser, although aggrieved by the government's conduct, was not entitled to enforce this commitment This decision was affirmed by the Court of Appeals for the Fifth Circuit, which likewise denied Dresser an effective opportunity to assert the government's commitment.

Dresser submits that the decision of the Court of Appeals for the Fifth Circuit cannot be reconciled with this Court's decision in *Santobello* v. *New York,* 404 U. S. 257. In *Santobello* this Court expressly held that a party has the right to enforce an agreement made with the Government. Nevertheless the Court of Appeals for the Fifth Circuit has denied Dresser this right. Although the Government has breached its commitment, and has indicated that it will continue to breach this commitment, the court of appeals has ruled that Dresser itself can take no action whatsoever to enforce its rights. The decision of the court of appeals is therefore contrary to those principles established in *Santobello,* and as such creates a significant conflict with this Court's recognition of a party's right to enforce a government agreement, a right now denied by the Court of Appeals for the Fifth Circuit. Predicated upon this conflict, Dresser respectfully submits that the instant case presents compelling grounds warranting consideration by this Court and appropriate relief to remedy the government's misdeeds.

II.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN DETERMINING THAT DRESSER'S LAWSUIT WAS NOT RIPE FOR JUDICIAL DETERMINATION WHERE THE GOVERNMENT'S CONDUCT WAS CLEARLY IN EXCESS OF LAWFUL AUTHORITY AND VIOLATIVE OF DRESSER'S RIGHTS AND THOSE OF ITS EMPLOYEES.

In affirming the dismissal of Dresser's complaint, the Court of Appeals for the Fifth Circuit concluded that Dresser's lawsuit was not ripe for judicial determination. The court of appeals found that although Dresser's charges of a breach of commitment by the Government and harm resulting therefrom were to be considered as true, Dresser could nonetheless not seek relief since its law suit constituted "pre-enforcement litigation." Adopting the government's mischaracterization of Dresser's action, the Court of Appeals for the Fifth Circuit concluded that Dresser could not enforce the government's commitment, but instead was compelled to await "final agency action" as a prerequisite to the assertion of the government's commitment.

However, in rendering its decision the court of appeals ignored the harm manifest in the government's "basically lawless" conduct, and misapplied the test of ripeness in a narrowly and overly restrictive manner thereby relieving the Government of responsibility for its actions.[4] The decision of the court of appeals insofar as it precludes relief from agency misconduct is contrary to the law of the Fifth Circuit and in conflict with the decisions of this Court.

Whether a case is ripe for judicial determination is contingent upon a consideration of those factors enunciated by this Court in *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967). In *Abbott* this Court noted:

> "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U. S. 136, 148.

4. *Oestereich* v. *Selective Service Board No. 11,* 393 U. S. 233, 237 (1968).

Although recogr' 'ng this test in its opinion, the Court of Appeals for the Fifth Circuit found neither fitness of the issues for review nor hardship to Dresser in that treatment received from the Government. In so doing the court of appeals disregarded the principle that where an agency acts in excess of lawful authority or in violation of a third party's rights, the principle of ripeness and the requirements of exhaustion of administrative remedies do not preclude immediate judicial review. *Gellis* v. *Casey,* 338 F. Supp. 651 (S. D. N. Y. 1972); *M. G. Davis & Co.* v. *Cohen,* 369 F. 2d 360 (2d Cir. 1966). Although the reviewability of agency conduct is limited by statute, the courts will not presume a legislative intent to license "free-wheeling agencies meting out their brand of justice." *Oestereich* v. *Selective Service Board No. 11,* 393 U. S. 233, 237 (1968). *See also Ralpho* v. *Bell,* 569 F. 2d 607 (D. C. Cir. 1977). Consequently, where there is a claim of agency misconduct, the courts will generally honor the presumption favoring reviewability.

In *Leedom* v. *Kyne,* 358 U. S. 184 (1958), this Court addressed a question of ripeness raised by the National Labor Relations Board in response to a suit filed by certain parties contesting the composition of a collective bargaining unit established by the NLRB. In *Leedom,* the plaintiffs attacked the Board's actions in appointing professional employees to a non-professional employees' bargaining unit in violation of § 9 (b)(1) of the National Labor Relations Act. The Board argued that the plaintiffs had not exhausted their administrative remedies prior to seeking judicial intervention, and therefore were precluded from access to the courts. This Court rejected the Board's arguments and found that since the Board had violated rights granted by Congress, the terms of the Act requiring an exhaustion of administrative remedies would not be construed to frustrate judicial review. On this point, this Court held as follows:

> "This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes." 358 U. S. 184, 188.

This Court further recognized that a denial of federal jurisdiction pursuant to the statutory restrictions might well result in the "obliteration" of individual rights. Recognizing the need for judicial intervention when a party's rights are violated by agency conduct, this Court noted:

> "Here, differently from the Switchmen's Case, 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control (A. F. of L. v. NLRB, 308 US 401, 84 L ed 347, 60 S Ct 300, supra), to protect and enforce that right. And 'the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.' 320 US, at 300. This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. 184, 190.

Dresser respectfully suggests that agency conduct in violation of a party's rights is equally at issue in the instant case. However, in rendering its opinion, the Court of Appeals for the Fifth Circuit has failed to acknowledge those considerations cited by this Court in *Leedom* v. *Kyne,* 358 U. S. 184. Rather than recognize agency conduct violative of Dresser's rights, the Court of Appeals for the Fifth Circuit has concluded that since there has not been a total release of that information compiled by Dresser pursuant to the Voluntary Disclosure Program, and since the physical harm feared by Dresser for its employees has not occurred, Dresser is not entitled to enforce the government's commitment. Dresser respectfully submits that the decision of the Court of Appeals for the Fifth Circuit conflicts with the precedent of this Court providing immediate judicial

relief to a party aggrieved by agency conduct in excess of lawful authority and in violation of a party's rights.

The Court of Appeals for the Fifth Circuit has also ignored those considerations of ripeness previously established in *Geisser* v. *United States,* 513 F. 2d 862 (5th Cir. 1975). As in the instant case, in *Geisser* the Government argued that the petitioner's suit was not ripe. The Government reasoned that because the petitioner in *Geisser* could not be extradited until the conclusion of her prison term, her lawsuit to prevent extradition was premature. The Court of Appeals for the Fifth Circuit, in *Geisser,* flatly rejected this argument and applying the appropriate test of ripeness concluded that the considerations of fitness for judicial review and hardship to the parties militated in favor of immediate judicial determination. The court of appeals noted that the mere threat that the Government would not honor its promise constituted sufficient injury to the petitioner to require immediate judicial determination. The court of appeals stated:

> "The Government asserts that, in any event, the case is not ripe since, if the prison term remains effective, the deportation cannot take place for several more years. We reject this for several reasons. To begin with it assumes that the order releasing her from further confinement will be reversed. But more basically, her very personal interests are so vitally affected that the situation of threatened return to prison and later extradition constitutes sufficient custody. Undoubtedly, Josette Bauer is harmed if there is any likelihood that the Government will not stand by its promise irrespective of whether she is five minutes or four years from deportation." 513 F. 2d 862, 872.

Based upon this language, the court of appeals concluded that the petitioner's suit was ripe. In rendering its decision in *Geisser,* the court of appeals was not unaware of those considerations limiting pre-enforcement lawsuits against government agencies. The court of appeals, however, found that these considerations did not preclude the petitioner from attempting to enforce the government's promise. In justifying an immediate judicial determination, the court of appeals recognized the petitioner's right

to relief. Noting the need for judicial intervention, the Court of Appeals for the Fifth Circuit stated as follows:

> "It is at this point we invoke principles akin to primary jurisdiction. This invaluable doctrine has evolved from what was originally a means of preventing courts from overriding agency jurisdiction to become a means to flexibly harness the resources of agency or departmental expertise to the judicial decision-making process. We have repeatedly benefited by the use of this mechanism.
>
> "It has special usefulness in a case such as this where the District Court and this Court need to know just exactly what the Secretary of State proposes to do in light of this confessed failure to keep the faith. Without this unified sovereign pronouncement, we strike out blindly to formulate a judicial remedy with unknown and weighty variables, not the least of which is treading upon delicate international relations." 513 F. 2d 862, 869-70.

The opinion of the Court of Appeals for the Fifth Circuit in the instant case cannot be reconciled with its decision in *Geisser*, nor with the test of ripeness set forth in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136. *See also Bankers Life & Casualty Co.* v. *Calloway*, 530 F. 2d 625 (5th Cir. 1976).

In the instant case, Dresser brought suit as a result of the government's conduct in breach of its commitment and in violation of Dresser's rights, as well as those of its employees and their families. The SEC by its refusal to honor its commitment to preserve the confidentiality of that information agreed to, and by its referral of Dresser's file to the Department of Justice, has violated Dresser's rights and those of its employees. However, the effect of the decision herein is to protect the Government from the consequences of its actions, while denying Dresser an effective opportunity to assert those rights violated by the Government.

There can be no justification for denying judicial review in the instant case where any delay in judicial intervention may result in "obliteration" of Dresser's rights under the government's

commitment. In finding that Dresser's suit was not ripe, the district court concluded that Dresser could assert its claims in the context of a "reverse FOIA" action to enjoin disclosure by the Government. Since the ruling of the district court, this Court in *Chrysler Corporation* v. *Brown*, ... U. S. ....., 60 L. Ed. 2d 208 (1979), has determined that the Freedom of Information Act does not contemplate injunctive actions to prevent disclosure, and that therefor such relief is not available to a party wishing to avert disclosure. Based upon this decision, an eleventh hour attempt by Dresser to prevent disclosure of that information provided to the SEC under assurances of confidentiality would undoubtedly be futile.[5]

Moreover, the availability of relief in the context of summary subpoena enforcement proceedings without the opportunity to adduce proof of its claims is not a satisfactory alternative for Dresser nor consistent with procedural due process. Therefore by its opinion, the court of appeals has denied Dresser an effective opportunity to raise and enforce the government's commitment. Predicated upon its adherence to inapplicable technical requirements, and misapplication of those facts before it, the court of appeals has deprived Dresser of an effective opportunity to hold the Government to its word.

Should the decision of the Court of Appeals for the Fifth Circuit stand, government conduct such as that in the instant case would, henceforth, be beyond redress both by the aggrieved party and by the judiciary. To apply the test of ripeness in a narrow and overly restrictive manner so as to protect the Government from responsibility for its misconduct such as in the instant case cannot be justified. The decision of the Court of Appeals for the Fifth Circuit in the instant case presents a significant departure from Federal law and a conflict of authority

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5. *General Dynamics Corp.* v. *Marshall*, 572 F. 2d 1211, 1215 (8th Cir. 1978):

> "In plain terms, FOIA is simply not applicable in reverse cases since the statute unequivocally states that the act 'does not apply' to matters of the type specified in the exemptions."

within the Fifth Circuit. Therefore, Dresser respectfuly prays that this Court grant review of the instant case to rectify the inequities created by the decision of the Court of Appeals for the Fifth Circuit.

III.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING THAT DRESSER DOES NOT HAVE STANDING TO BRING SUIT ON BEHALF OF THOSE DRESSER EMPLOYEES AND THEIR FAMILIES THEATENED BY THE GOVERNMENT'S MISCONDUCT, BUT UNABLE TO ASSERT THEIR OWN RIGHTS EFFECTIVELY UNDER THE PRIVACY ACT.

The Court of Appeals for the Fifth Circuit has determined that Dresser does not have standing to assert the rights of its employees and their families established under the Privacy Act.[6] In its opinion, the Court of Appeals for the Fifth Circuit erroneously concluded that since the Privacy Act applies only to "citizens of the United States or an alien lawfully admitted for permanent residency," Dresser as a corporation does not retain any rights under the Act and therefore may not raise and litigate its employees' rights thereunder. As a basis for its decision, the court of appeals incorrectly presumes, contrary to the Record, that Dresser claims corporate protection under the Privacy Act. Dresser does not now, nor did it before the district court, claim any rights of its own under the Privacy Act. The absence of corporate rights under this Act does not, however, preclude Dresser from asserting the individual rights of its employees, who are faced with the threat of harm resulting from a disclosure of their identities and locations, but who are powerless to effectively assert their own rights under the Privacy Act.

In enacting the Privacy Act, it was the intent of Congress to protect and preserve the rights of citizens to be free from the arbitrary and capricious collection and dissemination of con-

6. 5 U. S. C. § 552(a) (The Privacy Act of 1974).

fidential information affecting their vital interests.[7] While the Act provides for individual rights, as a practical matter a citizen's ability to assert these rights may be non-existent. This is particularly true in the instant case wherein those Dresser employees living and traveling abroad cannot assert their own interests without disclosing that information that Dresser seeks to protect on their behalf, and the confidentiality of which the Government had previously assured.[8] Dresser has therefore endeavored to assert the rights of its employees and their families because these individuals cannot do so themselves. By its decision the Court of Appeals for the Fifth Circuit has denied Dresser this right, and has thereby denied Dresser's employees and their families an effective opportunity to protect those vital interests as provided by the Privacy Act.

In *NAACP* v. *Alabama,* 357 U. S. 449 (1958), this Court considered the question of an organization's standing to assert the interests of third parties. In *NAACP,* the petitioner sought review of a contempt ruling arising out of petitioner's refusal to disclose the names and addresses of its members. This Court therein recognized the petitioner's standing to assert the claims of its members when they did not otherwise have a legal representative to protect their interests. Likewise, in the instant case, Dresser seeks to prevent the disclosure of the names and locations of its employees and their families. Consistent with this Court's holding in *NAACP* v. *Alabama,* 357 U. S. 449, Dresser is entitled to protect its employees by acting on their behalf to avert the threatened disclosure. The court of appeals

7. Congressional Findings and Statement of Purpose. Section 2 of Pub. L. 93-579. (The Privacy Act of 1974.)

8. This court has previously recognized this practical dilemma.

> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *NAACP* v. *Alabama,* 357 U. S. 449, 459 (1958).

has found however that Dresser may not protect the individual rights of its employees since Dresser itself does not retain similar rights under the Privacy Act. In reaching this conclusion the court of appeals confuses the question of Dresser's standing with its consideration of those rights established under the Privacy Act. Regardless of what statutory or constitutional rights are sought to be protected, Dresser is entitled to represent its employees and their families.

This Court has repeatedly recognized that the rights of third parties may be asserted and protected by another. This principle is especially true when the third party is unable to assert his or her own rights. *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972). This Court has also repeatedly recognized the standing of organizations to represent individuals who otherwise might not be capable of asserting their own rights. *Craig* v. *Boren,* 429 U. S. 190 (1976); *Hunt* v. *Washington State Apple Advertising Commission,* 432 U. S. 333 (1977). This principle applies as well to an employer challenging government conduct affecting the interests of its employees. *Naporano Metal & Iron Co.* v. *Secretary of Labor of U. S.,* 529 F. 2d 537 (3d Cir. 1976). Dresser, as the employer of U. S. citizens working and traveling abroad, maintains interests in common with its employees and their families who are threatened by the dissemination of that information compiled by Dresser pursuant to its participation in the Voluntary Disclosure Program. This threat cannot be minimized. Nonetheless, as a result of the decision herein, Dresser finds itself unable to protect its employees and their families from this threat.

Although there is no rational basis upon which to reconcile the decision in the instant case with those decisions of this Court that recognize a corporation's right to raise and litigate the interests of third parties, the Court of Appeals for the Fifth Circuit has denied Dresser this right. By so doing the court of appeals has imposed upon Dresser's employees and their families the onerous burden of coming forward, disclosing their

identities and locations, and openly contesting the government's arbitrary and capricious actions. Dresser respectfully submits that the Court of Appeals for the Fifth Circuit has erred in denying Dresser the right to protect the vital interests of its employees and their families. Predicated upon the failure of the Court of Appeals for the Fifth Circuit to recognize Dresser's standing to protect the interests of its employees and their families, there exists in the instant case a further conflict between the decisions of this Court and the decision of the Court of Appeals for the Fifth Circuit.

CONCLUSION.

WHEREFORE, by reason of the conflict between the decision of the Court of Appeals for the Fifth Circuit and the decisions of this Court and the several circuits, Dresser prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

DRESSER INDUSTRIES, INC., a corporation, on its own behalf and on behalf of certain Dresser employees,
Plaintiff-Appellant,

vs.

UNITED STATES of America,
Defendant-Appellee.

Nos. 78-1942, 78-2212.

United States Court of Appeals,
Fifth Circuit.

June 13, 1979.

Rehearing and Rehearing En Banc
Denied July 30, 1979.

Company brought suit against the Department of Justice and the Securities and Exchange Commission, seeking to forestall disclosure of details of certain "questionable foreign payments." The United States District Court for the Southern District of Texas, at Houston, Ross N. Sterling, J., granted defendants' motions to dismiss, and the company appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) the complaint's first three counts would, with one exception, be dismissed as to both the SEC and the Justice Department on the ground that those allegations were not ripe for decision; the exception was that dismissal of the first count (alleging the existence of a contract between the company and the SEC under which the company agreed to undertake an investigation of itself and the SEC agreed to preserve the confidentiality of the company's investigatory documentation reflecting the identities and locations of cer-

tain employees located overseas) as to the Justice Department would be affirmed for failure to state a claim; (2) the company lacked standing to litigate any claims which its employees might have under the Privacy Act, and (3) since the agencies' actions were not "reviewable by statute" and since there had been no "final" decision to disclose the information which the company wished the agencies to keep confidential, the exhaustion requirement of the Administrative Procedure Act precluded judicial review to determine whether, under the APA, the agencies' decision to disclose pursuant to the Freedom of Information Act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Affirmed.

1. Federal Civil Procedure—1773

A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed. Rules Civ. Proc. rule 12(b)(6), 28 U. S. C. A.

2. Records—35

In suit brought by company against the Department of Justice and the Securities and Exchange Commission, seeking to forestall disclosure of details of certain "questionable foreign payments," the complaint's first three counts would, with one exception, be dismissed as to both the SEC and the Justice Department on the ground that those allegations were not ripe for decision; the exception was that dismissal of the first count (alleging the existence of a contract between the company and the SEC under which the company agreed to undertake an investigation of itself and the SEC agreed to preserve the confidentiality of the company's investigatory documentation reflecting the identities and locations of certain employees located

overseas) as to the Justice Department would be affirmed for failure to state a claim. Fed. Rules Civ. Proc. rule 12(b)(6), 28 U. S. C. A.

3. Administrative Law and Procedure—701

Ripeness doctrine requires courts to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration; among factors to be considered are whether the issues are purely legal, whether they are based on final agency action, whether the controversy has a direct and immediate impact on plaintiff, and whether the litigation will expedite, rather than delay or impede, effectve enforcement by the agency.

4. Records—35

Even if, in suit brought by company against the Department of Justice and the Securities and Exchange Commission seeking to forestall disclosure of details of certain "questionable foreign payments," the complaint's first count could be construed to allege the existence of a contract between company and the SEC purporting to bind the Justice Department not to investigate the company, not to issue grand jury subpoenas and not to assess civil or criminal penalties, such a contract would not be enforceable because neither the SEC nor any of its agents possesses the authority to make such agreements.

5. United States—59

Federal Government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority.

6. Attorney General—6

In general, the conduct of litigation in which the United States is a party is reserved to officers of the Department of Justice, under the direction of the Attorney General. 28 U. S. C. A. § 516.

7. District and Prosecuting Attorneys—8

United States attorneys have the responsibility to prosecute all offenses against the United States, except as otherwise provided by law. 28 U. S. C. A. § 547.

8. District and Prosecuting Attorneys—8

Decision to prosecute is largely unreviewable by the courts.

9. Records—35

Company, seeking to forestall disclosure by the Department of Justice and the Securities and Exchange Commission of details of certain "questionable foreign payments," lacked standing to litigate any claims which its employees might have under the Privacy Act. 5 U. S. C. A. § 552a.

10. Records—35

Since, in suit brought by company against the Department of Justice and the Securities and Exchange Commission seeking to forestall disclosure of details of certain "questionable foreign payments," the agencies' actions were not "reviewable by statute" and since there had been no "final" decision to disclose the information which the company wished the agencies to keep confidential, the exhaustion requirement of the Administrative Procedure Act precluded judicial review to determine whether, under the APA, the agencies' decision to disclose pursuant to the Freedom of Information Act was "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. A. §§ 552, 701-706, 706(2)(A).

11. Federal Civil Procedure—1291

There need not be an independent basis for federal jurisdiction in a proceeding to perpetuate, but it must be shown that in the contemplated action, for which the testimony is being perpetuated, federal jurisdiction would exist and thus is a matter that may be cognizable in federal court. Fed. Rules Civ. Proc. rules 27, 27(c), 28 U. S. C. A.

12. Action—6

Question presented by complaint's sixth count, seeking to perpetuate certain testimony, was moot, since the contemplated actions had already taken place in the form of subpoena enforcement proceedings in the District of Columbia, and since any testimony which might have been lost due to the delay in the bringing of such actions by the Government had either been already given to a court of competent jurisdiction or had been lost. Fed. Rules Civ. Proc. rules 27, 27(a)(1), (c), 28 U. S. C. A.

Baker & McKenzie, Francis D. Morrissey, Thomas F. Bridgman, Thomas M. Haderlein, Chicago, Ill., George T. Barrow, Houston, Tex., David R. Macdonald, Chicago, Ill., for plaintiffs-appellants in No. 78-1942.

Baker & McKenzie, Francis D. Morrissey, Thomas F. Bridgman, William J. Linklater, Norman J. Barry, David R. Macdonald, Chicago, Ill., for plaintiffs-appellants in No. 78-2212.

Richard S. Stolker, Dept. of Justice, Washington, D. C., J. A. Canales, U. S. Atty., Richard Parker, Jr., Asst. U. S. Atty., Houston, Tex., John P. Sweeney, James H. Schropp, Arthur M.

Schwartzstein, Paul Gonson, Assoc. Gen. Counsel, SEC, Washington, D. C., for defendant-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before COLEMAN, GODBOLD, and INGRAHAM, *Circuit Judges.*

COLEMAN, *Circuit Judge.*

This case represents some of the efforts of Dresser Industries, Inc., the plaintiff-appellant, to forestall disclosure of the details of certain transactions which are now commonly referred to as "questionable foreign payments". Dresser filed this suit in the Southern District of Texas seeking *inter alia,* declaratory and injunctive relief against the Department of Justice and the Securities and Exchange Commission. Both defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (b)(6). The District Judge granted the motions but did not specifically state the grounds for the decision. We affirm.

The Allegations in the Complaint

Dresser's complaint traces the recent history of its dealings with the SEC and the Justice Department concerning these "questionable foreign payments". As early as January 1976, Dresser personnel met wtih members of the SEC staff and voluntarily agreed to conduct an inquiry to determine the nature and amount of any such payments made by its employees. At this meeting Dresser indicated its deep concern for maintaining the confidentiality of any documents that might be examined by the SEC staff with reference to the payments. A key allegation of the complaint is that:

> In response to Dresser's concern for the protection of the confidentiality of such documents, the then Director of the SEC's Division of Corporation Finance expressed the SEC's intention to preserve the confidentiality of Dresser's investigatory documentation reflecting the identities and locations of certain Dresser employees located overseas. In addition, one of the counsel for the SEC did in fact, subsequent to said meeting, make specific representations as to the procedures which would be followed in the event the staff deemed a review of documents underlying Dresser's special inquiry necessary. Such procedures included a commitment that, if it was necessary to examine documents at all, the examination of documents would be conducted off the SEC premises without making copies of any examined documentation and without taking any notes.

Dresser then conducted an inquiry into these matters, questioning numerous employees and examining countless corporate records. It found no domestic payments of a questionable nature, but it did uncover evidence of some "questionable foreign payments". These payments allegedly amounted to less than one-tenth of one percent (0.1%) of Dresser's sales in any year, and the aggregate business related to such payments was, according to Dresser, "immaterial". Certain of these payments had been made because of extortionate threats by foreign nationals against Dresser employees abroad.

In December 1976, the SEC began to make demands for certain of Dresser's files relating to the special inquiry, although when the complaint was filed no formal demand, as by subpoena, had been served upon Dresser. In the meantime, the Department of Justice had also requested, again on an informal basis prior to the filing of the complaint, certain of Dresser's files. The complaint states that both the SEC and the Department of Justice had represented to Dresser that the agencies were unaware of any violations of United States law committed by Dresser. Dresser also alleges that it is unaware of any violations of the law committed by any of its employees connected with these "questionable foreign payments."

Dresser further alleges that the SEC has turned over its files to the Justice Department Task Force and will continue to turn over to the Task force any and all further information collected

relative to these questionable payments, "without regard to the concern of Dresser that the release of such information jeopardizes the safety of certain of its employees." The complaint also charged that a subpoena for the documents sought by the Justice Department "may well be imminently issued." Finally, Dresser asserted that there are outstanding Freedom of Information Act requests for all documents that it might supply to the Department of Justice and that the Department "has refused or been unable to assure" Dresser that any information turned over to the Department would not be disclosed pursuant to these standing FOIA requests.

In addition to the basic facts, as thus related, the complaint mentioned several legal theories in support of Dresser's claims for relief, which included prayers for: an injunction, a declaratory judgment, the perpetuation of certain evidence and testimony, and a protective order. More specifically, Dresser asked the Court to enjoin the defendant

> from taking any further action in connection with its investigation of Dresser, including but not limited to, issuance of orders of investigation or Grand Jury subpoenas or the assessment of civil or criminal penalties, for plaintiff's failure to produce that confidential information requested or subpoenaed by the [Department of Justice] or SEC and pertaining to the special inquiry conducted by Dresser.

In addition, Dresser asked that the SEC be enjoined from delaying its approval of registration statements or proxy statements filed by Dresser.

Dresser also sought a declaratory judgment that the collection of information by either of these agencies with respect to the identities of foreign persons and countries involved in these questionable payments violated the Privacy Act of 1974, 5 U. S. C. § 552a. A declaratory judgment was likewise sought that the agencies abused their discretion in failing to assure Dresser that such matters are exempt from disclosure under the Freedom of Information Act, 5 U. S. C. § 552, and that the

agencies would not release such material, such abuses being within the scope of the Administrative Procedure Act, 5 U. S. C. §§ 701-706.

In the event that the court found the requested injunctive and declaratory relief inappropriate, Dresser requested, in extremely detailed form, a protective order and the perpetuation of certain evidence. In essence, Dresser desired to deposit all of its records, deposition testimony, and other evidence relating to such payments with the court, which would then control access to the evidence under strictly limited conditions. In Dresser's view, court control would guarantee the confidentiality of the evidence and protect its employees from the reprisals which might occur if the information became public.

The Dismissal of the Complaint

Although the District Court did not specify whether the dismissal of the complaint was predicated upon a lack of subject matter jurisdiction or for failure to state a claim upon which relief could be granted, we are of the opinion that the complaint was properly dismissed, for the reasons set forth below.

[1] In reaching this conclusion we are mindful that a complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Cook & Nichol, Inc.* v. *Plimsoll Club,* 5 Cir. 1971, 451 F. 2d 505, 506-507.

[2] We affirm, with one exception, the dismissal of Counts I, II, and III as to both the SEC and the Justice Department on the grounds that these allegations are not ripe for decision. The exception is that the dismissal of Count I as to the Justice Department is affirmed for failure to state a claim. Count I, broadly construed and interpreted on this 12(b)(6) motion, alleges the existence of a contract between the SEC and Dresser,

under which Dresser agreed to undertake an investigation of itself and the SEC agreed, among other things, "to preserve the confidentiality of Dresser's investigatory documentation reflecting the identities and locations of certain Dresser employees located overseas." Count II alleges that the SEC has exceeded its statutory authority to order an investigation of Dresser.[1] Count III asserts that the agencies' demands for the production of certain evidence indicate that "the defendant seeks to summarily deprive plaintiffs and its employees of their rights to equal protection and due process secured to them by the Fifth Amendment", and also constitute an invasion of rights to privacy secured by the Fourth Amendment.

[3] In our opinion, Dresser has failed to present issues that are ripe for judicial review under the criteria spelled out in *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Most basically, the ripeness doctrine requires courts to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Among the factors to be considered are: (1) whether the issues are purely legal; (2) whether the issues are based on final agency action; (3) whether the controversy has a direct and immediate impact on the plaintiff; and (4) whether the litigation will expedite, rather than delay or impede,

1. Although we emphasize that we place our decision on the dismissal of Count II on ripeness grounds, we think that there is a substantial question as to whether the dismissal could not be affirmed for the failure to state a claim upon which relief could ever be granted. Even if the SEC has indicated to Dresser that it has no knowledge that any laws have been broken, the Commission is empowered by statute to investigate and determine for itself whether any laws have been violated. This power is analogous to that of the Grand Jury, and the SEC "can investigate merely on [the] suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.,* 338 U. S. 632, 642-643, 70 S. Ct. 357, 364, 94 L. Ed. 401 (1950). Judicial supervision of agency decisions to investigate might hopelessly entangle the courts in areas that would prove to be unmanageable and would certainly throw great amounts of sand into the gears of the administrative process.

effective enforcement by the agency. *Id.,* 387 U. S. at 149-54, 87 S. Ct. 1507.

Each of the *Abbott Laboratories* factors militates against judicial review at this time. First, the issues are not purely legal. Dresser has constantly asserted that it needs extensive discovery in order to develop its claims, and it appears that an extensive factual inquiry would be necessary in order to ascertain the existence of the implied contract with the SEC. As for the constitutional and statutory claims, they appear rather nebulous at best and are most definitely not strictly legal. Second, there is no "final" agency action involved here. The complaint alleges that the SEC and the Justice Department have made informal demands for certain documents, but these are not final agency actions and Dresser is apparently under no legal obligation to comply. It faces no sanctions for noncompliance at this point, and until it turns over the documents there is certainly no danger that the agencies will disclose that which they do not have. Third, we fail to discern the direct and immediate impact upon Dresser which will be visited upon it if judicial review is postponed. It can, and in fact already has,[2] litigated these issues in subpoena enforcement proceedings, and the only "hardship" identified by Dresser is the possibility that it may not have the broad discovery rights in those proceedings that it might have in this case. In a case such as that now before us, such a difference, even if it exists, does not constitute a "hardship" sufficient to warrant pre-enforcement judicial review of non-final agency

2. On May 19, 1978, in an unreported opinion, District Judge Parker in the District of Columbia ordered Dresser's Chairman of the Board to comply with a grand jury subpoena. Dresser raised and litigated substantially all of the claims raised in the case now before us, and Judge Parker rejected all of them on the merits. On June 30, 1978, District Judge Flannery denied Dresser's motion to quash an SEC subpoena and also rejected substantially all of the arguments that Dresser presents in the instant case. *SEC* v. *Dresser Industries, Inc.,* 453 F. Supp. 573 (D. D. C. 1978). The parties have extensively briefed the question of whether Dresser is now collaterally estopped to litigate identical issues in this case now that its claims have been adversely decided in other cases, but our disposition of the case makes it unnecessary for us to reach this question.

action. *See A. O. Smith Corp.* v. *FTC*, 3 Cir. 1976, 530 F. 2d 515, 526-27. Finally, this litigation would most certainly delay or impede effective enforcement by the agencies. Both the SEC and the Department of Justice might decide that their scarce investigative and prosecutorial resources could be better invested elsewhere, and they might decide to drop the investigations of Dresser entirely. In any case, the courts should not abet the process by making the agencies defend against a plaintiff that they might not even consider worth investigating. The fact that both agencies are now pursuing separate actions against Dresser in the District of Columbia does not influence our decision, for we must concern ourselves with the impact on the parties of allowing this pre-enforcement litigation to continue or die on the vine.

Therefore, on the ground that the issues presented are not ripe for judicial review, we affirm the dismissal of Counts I, II, and III as to the SEC and Counts II and III as to the Department of Justice.[3]

[4] Even if Count I could be construed to allege the existence of a contract between Dresser and the SEC which would purport to bind the Department of Justice not to investigate Dresser, not to issue Grand Jury subpoenas, and not to assess civil or criminal penalties, such a contract would not be enforceable because neither the SEC nor any of its agents possess the authority to make such agreements.

[5] It is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947); *Posey* v. *United States*,

3. To the extent that the complaint may be fairly read to allege the existence of coordinated civil and criminal investigations, a claim which might be cognizable under *United States* v. *LaSalle National Bank*, 437 U. S. 298, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978), we also find that such a claim is not ripe for adjudication in this case. *Cf. United States* v. *Fields*, 2 Cir. 1978, 592 F. 2d 638.

5 Cir. 1971, 449 F. 2d 228, 234; *Jackson* v. *United States*, Ct. Cl. 1978, 573 F. 2d 1189, 1197-98. As the Supreme Court stated in the *Merrill* case:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. 332 U. S. at 384, 68 S. Ct. at 3.

If the rule were otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department. Such a result could not be countenanced.

[6-8] In general, the conduct of litigation in which the United States is a party is reserved to officers of the Department of Justice, under the direction of the Attorney General. 28 U. S. C. § 516. More specifically, the United States Attorneys have the responsibility to prosecute all offenses against the United States, "[e]xcept as otherwise provided by law." 28 U. S. C. § 547. The decision to prosecute is largely unreviewable by the courts. *United States* v. *Cox*, 5 Cir. 1965, 342 F. 2d 167, *cert. denied*, 381 U. S. 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965). Furthermore, courts have held that not even a United States Attorney can bind his counterpart in another district to dismiss an indictment, *United States* v. *Boulier*, 359 F. Supp. 165, 170-71 (E. D. N. Y. 1972), *aff'd* 2 Cir. 1973, 476 F. 2d 456, *cert. denied*, 414 U. S. 823, 94 S. Ct. 171, 38 L. Ed. 2d 56 (1973); and that even prosecutors have no power to grant immunity in the absence of a statute

specifically conferring it, *United States* v. *Gorham,* 1975, 173 U. S. App. D. C. 139, 523 F. 2d 1088, 1096.

No statute authorizes agents of the SEC to grant immunity from prosecution or to curtail the prosecutorial discretion of the Department of Justice and United States Attorneys. In fact, both the Securities Act of 1933 and the Securities Exchange Act of 1934 expressly provide that the Commission may transmit evidence of criminal wrongdoing to the Attorney General, who may institute the necessary criminal proceedings. 15 U. S. C. §§ 77t(b) and 78u(d). Since the SEC's agents lacked actual authority to contractually limit the prosecutorial function of the Department of Justice, any such agreement with Dresser would be unenforceable.[4] *Cf. Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976) (Civil Service Commission regulation held invalid because not based upon considerations properly entrusted to that agency).

[9] Count IV of the complaint sought a declaratory judgment that the demands for information by the SEC and the Justice Department violated the Privacy Act of 1974, 5 U. S. C.

4. This question of actual authority readily distinguishes the principal cases relied upon by Dresser. In *Santobello* v. *New York,* 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the prosecutor, in return for a guilty plea, agreed not to recommend a sentence to the court. However, at the time of sentencing, a new prosecutor, unaware of the prior bargain, recommended the maximum sentence, which the trial judge ultimately imposed. The Supreme Court found that the defendant was entitled to the benefit of his plea bargain and remanded the case to the New York courts for reconsideration. In *Santobello,* there was no question that the first prosecutor possessed actual authority to strike the bargain with the defendant, and the Court did not hesitate to order that the bargain be kept.

Similarly, in our cases of *Geisser* v. *United States,* 5 Cir. 1975, 513 F. 2d 862 (*Geisser I*), and *Geisser* v. *United States,* 5 Cir. 1977, 554 F. 2d 698 (*Geisser II*), there was no question that the prosecutor had actual authority to bargain with the defendant and to commit the Department of Justice to use its "best efforts" to prevent extradition. *See ibid.,* 554 F. 2d 703. We did not conclude that the prosecutors had guaranteed the defendant she would not be extradited. Such a guarantee, in view of the mandatory terms of the extradition treaty with Switzerland, might not have been within the authority of the Department of Justice attorneys to make.

§ 552a. Although the complaint incorrectly alleged that jurisdiction existed under the Declaratory Judgment Act, 28 U. S. C. §§ 2201, 2202, *see Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950), the Privacy Act does contain an explicit grant of jurisdiction to federal district courts, *see* 5 U. S. C. § 552a(g). Dresser, however, is without standing to pursue this issue because, being a corporation, it is not an "individual" as defined in the Privacy Act. 5 U. S. C. § 552a(a)(2) defines an "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." The legislative history leaves no room for debate on this subject. The Senate Report indicates that Congress, by using this definition, intended to distinguish "between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act." S. Rep. No. 1183, 93d Cong., 2d Sess. 79, *reprinted in* [1974] U. S. Code Cong. & Admin. News, pp. 6916, 6993. We hold that Dresser lacks standing to litigate any claims which its employees might have under the Privacy Act. *See Raven* v. *Panama Canal Co.,* 5 Cir. 1978, 583 F. 2d 169, 170-71; *Stone* v. *Export-Import Bank of United States,* 5 Cir. 1977, 552 F. 2d 132, 136-37 & n. 7; *Shermco Industries* v. *Sec. of the Air Force,* 452 F. Supp. 306, 314-15 (N. D. Tex. 1978).

[10] Count V of the complaint sought a declaratory judgment that the refusals of the SEC and the Department of Justice to acknowledge the applicability of certain exemptions from the disclosure requirements of the Freedom of Information Act, 5 U. S. C. § 552, constitute abuses of discretion proscribed by the Administrative Procedure Act, 5 U. S. C. §§ 701-706. In the recent case of *Chrysler Corp.* v. *Brown,* ..... U. S. ....., 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), the Supreme Court unanimously held that the Freedom of Information Act does not afford a person or an entity a right to enjoin agency disclosure of information. Jurisdiction to review agency action

under the APA is found in 28 U. S. C. § 1331. *See Califano* v. *Sanders*, 430 U. S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). 5 U. S. C. § 704 subjects to judicial review only those agency actions which are "made reviewable by statute" or which are "final", however. This is not a jurisdictional requirement, but rather an exhaustion of administrative remedies requirement, subject to a few carefully limited exceptions. As such, it performs a function similar to the judicial doctrine of ripeness by postponing judicial review. Since the agencies' actions in this case are not "reviewable by statute" and since there has been no "final" decision to disclose the information which Dresser wishes the agencies to keep confidential, the exhaustion requirement of the APA precludes judicial review to determine whether, under 5 U. S. C. § 706(2)(A), the agency decision to disclose pursuant to the Freedom of Information Act is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Georator Corp.* v. *EEOC*, 4 Cir. 1979, 592 F. 2d 765.

Count IV of the complaint failed to state a claim upon which relief could be granted.

[11, 12] Count VI petitioned the District Court to perpetuate certain testimony pursuant to Fed. R. Civ. P. 27(c). There need not be an independent basis of federal jurisdiction in a proceeding to perpetuate, but it must be shown that in the contemplated action, for which the testimony is being perpetuated, federal jurisdiction would exist and thus is a matter that may be cognizable in the federal courts. *Arizona* v. *California*, 292 U. S. 341, 347, 54 S. Ct. 735, 78 L. Ed. 1298 (1934). Because we have concluded that all the other counts in the complaint were properly dismissed, we shall assume, for present purposes, that the petition to perpetuate met the requirements of Rule 27, and, in particular, the requirement that Dresser "expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought," Fed. R. Civ. P. 27(a)(1). We also shall assume, but only for present purposes, that the conclusory allegations of the complaint that the testimony and documents sought to be perpetuated "may become unavailable" satisfy the requirement that the taking of testimony is made necessary by the danger that it may be lost by delay. *Arizona* v. *California*, *supra*, 292 U. S. at 347-48. *See generally* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2072 (1970). We hold, however, that this controversy is now moot because the contemplated actions have already taken place in the form of subpoena enforcement proceedings in the District of Columbia. Any testimony which might have been lost due to the delay in the bringing of such actions by the government has either been already given to a court of competent jurisdiction or it has been lost. We therefore affirm the District Court's dismissal of this count on the grounds that the question presented is now moot.

Count VII sought a protective order pursuant to Fed. R. Civ. P. 26(c). Since all other claims for relief were properly dismissed, no case or controversy exists in which a party can obtain discovery or seek a protective order under the general discovery provisions of Rule 26. Therefore, this count was properly dismissed.

AFFIRMED.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

DRESSER INDUSTRIES, INC.
vs.
UNITED STATES OF AMERICA
} Civil Action No. H-78-405

ORDER.

Came on to be heard Defendant SEC's motion to dismiss, and the Court having considered the motion and the briefs and arguments of counsel, it is

ORDERED that the motion should be and hereby is GRANTED.

DONE at Houston, Texas, this 26th day of May, 1978.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX C.

§ 552a. RECORDS MAINTAINED ON INDIVIDUALS

(a) Definitions

For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

"(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of Disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of

the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of Certain Disclosures

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the

record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to Records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements

Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4) (D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about

whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency Rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records

named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil Remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred

in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of Legal Guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by

a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal Penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General Exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which preforms as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an indentifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific Exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit

that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity of fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source

would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival Records

Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall,

for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government Contractors

When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing Lists

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on New Systems

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual Report

The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) Effect of Other Laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(Added Pub. L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub. L. 94-183, § 2(2), Dec. 31, 1975, 89 Stat. 1057.)

No. 79-685

In the Supreme Court of the United States

OCTOBER TERM, 1979

DRESSER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 596 F. 2d 1231.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1979. A petition for rehearing was denied on July 30, 1979. The petition for a writ of certiorari was filed on October 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to challenge investigations of the Securities and Exchange Commission and a grand jury sitting in the District of Columbia

by filing a collateral suit in the Southern District of Texas prior to the issuance of investigative subpoenas by either the Commission or the grand jury.

2. Whether petitioner had standing to bring suit on behalf of its employees under the Privacy Act.

STATEMENT

1. The present litigation results from petitioner's attempts to enjoin ongoing independent investigations by the Securities and Exchange Commission and the Department of Justice into certain questionable or improper foreign payments. The investigations followed petitioner's participation in the SEC's "voluntary disclosure program" (Pet. 4-5; Pet. App. A6). The voluntary disclosure program was instituted by the SEC in 1974 as a result of revelations of bribery of foreign political officials and of other questionable payments by United States corporations. Encouraging corporations to comply with the disclosure requirements of the federal securities laws, the SEC suggested that concerned corporations could best meet their obligations by taking the following steps:[1]

(1) authorizing an independent investigation, the results of which would be reported to a special committee of the board of directors whose members were not involved in any questionable activities and who were not officers of the corporation;

[1]The voluntary disclosure program is fully described in the *Report on Questionable and Illegal Corporate Payments and Practices*, submitted by the SEC to the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 4-11 (Comm. Print, May 1976). It is also described in detail in the opinion of the court of appeals in *SEC* v. *Dresser Industries, Inc.*, No. 78-1702 (D.C. Cir. Nov. 19, 1979), slip. op. 3-5.

(2) adopting an appropriate corporate policy with respect to such payments or practices; and

(3) disclosing material facts developed during the investigation in reports filed publicly with the SEC.

The SEC's program contemplated complete disclosure of material facts with respect to any questionable payments made during the five preceding years.

The SEC cautioned corporations with respect to possible consequences of participating in the voluntary disclosure program. The SEC stated that "participation in the voluntary program does not insulate a company from Commission enforcement action * * *." Moreover, participants were warned that "the Commission refers matters that appear to represent violations of domestic law to the appropriate law enforcement authorities." The SEC also stated to participants that as "[a]n essential element" of the program, participants "must agree to grant the Division of Enforcement access to the report and its underlying documentation." Participants were advised that "[m]aterials submitted to the Commission may be subject to release under the Freedom of Information Act or pursuant to Congressional request." *Report on Questionable and Illegal Corporate Payments and Practices*, *supra*, at 8-9.

2. In January 1976, petitioner entered the SEC's voluntary disclosure program. At a meeting with the SEC's staff, petitioner stated that it was conducting an internal inquiry into questionable payments (Pet. App. A6). Petitioner gave the SEC written assurances that it would provide access to all documents collected during its investigation (R. 101, 105).[2] Subsequently, petitioner

[2] "R." refers to the record in the court of appeals.

reported, in general terms, a number of questionable or illegal foreign payments on forms filed with the SEC (R. 3).[3]

The SEC's staff requested access to petitioner's report of investigation and underlying documents in accordance with the terms of the program and petitioner's written undertaking (R. 4; Pet. App. A7). Failing to comply with its earlier agreement, however, petitioner denied the SEC access to the underlying documents, contending that it was concerned about potential public release of the documents pursuant to the Freedom of Information Act (R. 19-24).[4]

3. In the fall of 1976, the Department of Justice established a task force to investigate possible criminal violations by United States corporations arising from questionable foreign payments. In August 1977, the SEC granted the Department's request to make available to task force attorneys and investigators its files, which included information concerning several hundred corporations, including petitioner. Because the materials furnished by petitioner to the SEC did not identify the

[3]Contrary to the requirements of the voluntary disclosure program, the information described in those filings related only to a three-year period (R. 101).

[4]SEC staff members assured petitioner's counsel that its concern about public release of information would be ameliorated, to the extent permitted by law, by providing notice to petitioner in advance of any public release of the information under the Freedom of Information Act (R. 103, 133-134).

countries or participants in the firm's foreign payments, the task force attempted to secure voluntary production of this information. No agreement was reached.[5]

4. Petitioner subsequently filed suit in the United States District Court for the Southern District of Texas to restrain the investigation of the SEC and Department of Justice (R. 1). It took this action before the SEC had determined to pursue a formal investigation and before the grand jury had issued a subpoena. The complaint sought to enjoin demands for additional information by the Department of Justice and the SEC, or, in the alternative, to obtain continuous supervision by the district court over each investigation. In addition, petitioner sought an order that the SEC and the Department of Justice acknowledge the availability of an exemption from disclosure under the Freedom of Information Act and an assurance that they would not release corporate information (R. 13).

The district court dismissed petitioner's complaint. The United States Court of Appeals for the Fifth Circuit affirmed (Pet. App. A), holding that petitioner's claim that the SEC had exceeded its authority was not ripe for review and that its allegation that the SEC breached its agreement to maintain complete confidentiality of its documents did not state a claim upon which relief could be granted.

5. In April 1978, a subponena duces tecum, returnable before a grand jury in the District of Columbia, was served upon John V. James, petitioner's Chairman,

[5]The Department of Justice offered to accept information from petitioner on the understanding that it would be maintained in confidence, stored in locked facilities, and returned to petitioner in the event that the investigation ended without the initiation of criminal proceedings. Petitioner's attorneys were also informed that it was the policy of the Department of Justice not to release

President and Chief Executive Officer (DOJ Br. App. 17).[6] Petitioner subsequently sought to quash the grand jury subpoena in the District Court for the District of Columbia. The district court ordered petitioner to comply with the subpoena, after entering an order pursuant to Fed. R. Crim. P. 6(e) to preserve the confidentiality of the documents in question (DOJ Br. App. 34, 37). Petitioner thereafter produced the documents sought by the grand jury.

6. In the meantime the SEC issued a formal order initiating an investigation. This action was undertaken in light of petitioner's continued refusal to honor its agreement to grant the SEC access to the documents relating to petitioner's investigation of improper corporate payments (SEC Br. App. 7-9).[7] An administrative subpoena was subsequently issued (*id.* at 14-16). When petitioner failed to respond to the subpoena, the SEC applied to the United States District Court for the District of Columbia for an order compelling compliance (*id.* at 1-6). After holding a hearing on the SEC's application, and after considering all of petitioner's challenges to the subpoena and the SEC's investigation, the district court ordered petitioner to comply with the subpoena in all respects. *SEC* v. *Dresser Industries, Inc.*, 453 F. Supp. 573 (D.D.C. 1978). The United States Court of Appeals for the District of Columbia Circuit subsequently affirmed. *SEC* v. *Dresser Industries, Inc.*, No. 78-1702 (D.C. Cir. Nov. 19, 1979), slip op. 28 (petitions for rehearing pending).

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materials developed during an ongoing criminal investigation or to disclose commercial trade secrets or information obtained from a confidential source.

[6] "DOJ Br. App." refers to the appendix to the brief for the Department of Justice in the court of appeals.

[7] "SEC Br. App." refers to the appendix to the SEC's brief in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the District Court for the Southern District of Texas should have entered an order enjoining the investigations of the SEC and the grand jury sitting in the District of Columbia or should have sequestered and monitored the use of documents obtained in the course of both investigations. The basis for this assertion is that certain members of the SEC's staff purportedly caused petitioner to believe that the documents that it tendered to the agency would be held in complete confidence, would not be used in additional investigations, and would not be subject to public disclosure under the Freedom of Information Act.

However, even assuming that there were merit to petitioner's claim that an agreement between itself and the SEC had been breached (which there is not, as discussed below), it was not permissible for petitioner to challenge the ongoing investigations of the grand jury and the SEC by filing a collateral proceeding in the District Court for the Southern District of Texas. Petitioner had a fully adequate remedy in the subpoena enforcement forum—the District Court for the District of Columbia. Petitioner was free to (and did) raise all of its challenges to the investigations in that forum at the time the government sought enforcement of the subpoenas. In light of the fully adequate procedures for judicial review available in the District Court for the District of Columbia, petitioner's collateral attack was properly dismissed. See *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964) (judicial review limited to the subpoena enforcement forum "works no injustice and suffers no constitutional invalidity"); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-175 (1927); *Casey* v. *FTC*, 578 F. 2d 793, 798-799 (9th Cir. 1978). See also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967).

Although petitioner argues (Pet. 18-24) that its rights would be "obliterated" absent collateral review in the Southern District of Texas, it has failed to show any error in the conclusions of the court below (Pet. App. A11-A12) that there was no "final" government action justifying immediate judicial review, that petitioner would suffer no irreparable injury from being required to pursue its remedies in the subpoena enforcement forum, and that the present litigation would "most certainly" impede effective enforcement of the law. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149-154. These considerations were sufficient to justify the decision of the lower courts remitting petitioner to its remedies in the District Court for the District of Columbia.

Moreover, although the court below did not decide whether the SEC had in fact breached any agreement with petitioner, that question was addressed in the subpoena enforcement forum. When it enforced the SEC's subpoena, the District Court for the District of Columbia found (453 F. Supp. at 575):

> Throughout the voluntary disclosure program the SEC reserved its rights to pursue a formal investigation and issue subpoenas if necessary. It is readily apparent that the SEC never agreed to completely forego its rights to subpoena additional material. Furthermore, there is no indication that the SEC has proceeded in bad faith.

The D.C. Circuit also held, in affirming the district court's order, that no breach of agreement with petitioner ever occurred. *SEC* v. *Dresser Industries, Inc.*, *supra*, slip op. 23.

Finally, as the court below correctly noted, even if petitioner believed that the employees of the SEC with whom it dealt intended to offer an agreement that would

foreclose further investigation by the SEC and the Department of Justice, petitioner and its experienced counsel had no legal basis for relying on such an offer. Employees of the SEC are not empowered to waive the agency's statutory authority to investigate violations of the law, much less to tie the hands of the Department of Justice in investigating federal crimes.[8] Equally, they have no power to alter the terms of the Freedom of Information Act. As the court of appeals correctly noted (Pet. App. A12-A13):

> [T]he federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority * * *. 'Whatever the form in which the Government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority.' * * * If the rule were otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of the most heinous crimes * * *.

The cases cited by petitioner do not support an opposite result and do not conflict with the decision of the court of appeals in the present case. *United States* v. *Minnesota Mining & Manufacturing Co.*, 551 F. 2d 1106 (8th Cir. 1977), and *Santobello* v. *New York*, 404 U.S. 257 (1971), do not address the question of ripeness or appropriate forum. Both cases were criminal

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[8]See, *e.g.*, *United States* v. *Fields*, 592 F. 2d 638, 646-648 (2d Cir. 1978), cert. denied, No. 78-1474 (June 4, 1979) (assurances by SEC staff members do not bar criminal prosecutions by the Department of Justice).

prosecutions in which the defendant invoked a prior plea agreement with the government in the court in which the prosecution was pending. In neither case was there a more appropriate forum—such as the subpoena enforcement forum here involved—in which the defendant's claims should have been raised. Moreover, in each case the prosecutor possessed authority to negotiate binding plea agreements with the criminal defendants (see, *e.g.*, 404 U.S. at 261). Similarly, in *Geisser* v. *United States*, 513 F. 2d 862 (5th Cir. 1975), the district court adjudicated a claim of breach of a plea agreement in a habeas corpus proceeding. The forum in which the habeas corpus petition was filed was the same forum in which the defendant had pleaded guilty after her plea agreement. The same district judge who had approved the plea agreement was asked to determine whether it had been breached. See *In Petition of Geisser*, 554 F. 2d 698, 699 (5th Cir. 1977). No question of by-passing the appropriate forum was presented. Moreover, the plea agreement that the petitioner sought to enforce in *Geisser*—a promise by the prosecutor to use his "best efforts" to persuade the Department of State and the Swiss government to forego extradition—did not involve a relinquishment of the government's statutory authority to investigate violations of federal law (see 554 F. 2d at 706).[9]

2. Petitioner finally contends (Pet. 24-27) that the court of appeals erred in denying it standing to litigate claims that its employees might have under the Privacy

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[9]*Leedom* v. *Kyne*, 358 U.S. 184 (1958), is likewise irrelevant here. That case involved final agency action that was amenable to judicial review on an immediate basis. The Court noted that the plaintiffs had "no other means" to "protect and enforce" their rights. *Id.* at 190-191. In the present case, a grand jury and administrative investigation were in their incipient stages; petitioner was free to (and did) challenge demands for documents and information in the subpoena enforcement forum.

Act of 1974, 5 U.S.C. 552a. But the Act vests the district court with jurisdiction over actions commenced by an "individual." See 5 U.S.C. 552a(g)(1). The petitioner corporation is not an "individual" as defined in the Privacy Act (5 U.S.C. 552a(2)) and thus is unable to assert claims under the Act, either for itself or others. The court of appeals noted (Pet. App. A15) that the Act's legislative history leaves "no room for debate" on this subject. "Congress, by using [a restrictive definition of 'individual'] intended to distinguish 'between the rights which are given to the citizens as individuals under this Act and the rights of * * * corporations which are not intended to be covered by this Act." See S. Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1980

DOJ-1980-01

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-685

DRESSER INDUSTRIES, INC., A CORPORATION, ON ITS OWN BEHALF AND ON BEHALF OF CERTAIN DRESSER EMPLOYEES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF.

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v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF.

PREFATORY NOTE.

Certain misstatements of fact and mis-characterizations of the Record contained within Respondent's Brief necessitate a reply by the Petitioner. Although Respondent has not raised novel issues in its Brief, Petitioner is nonetheless constrained, with this Court's indulgence, to correct those inaccuracies set forth within Respondent's Brief.

ARGUMENT.

Respondent has in its Brief seriously mis-characterized both the issues before this Court and the history of the present controversy. Respondent, in a flagrant attempt to divert this Court's attention from those crucial issues raised by Petitioner, has submitted to this Court certain questions which, though convenient to Respondent, do not honestly reflect those matters truly at issue. Respondent suggests, contrary to the Record, that the suit filed by Petitioner in the district court constituted a collateral attack upon SEC and grand jury investigations, and certain subpoenae issued in tandem by each in April of 1978. Respondent's mis-characterization of Petitioner's action belies the true nature of Petitioner's suit. It has been and remains Petitioner's purpose to enforce a commitment which Respondent has willfully repudiated. Yet, as was true in both the district court and the court of appeals, Respondent has mis-characterized Petitioner's action in an attempt to avoid, by administrative and procedural indirection, those moral and legal responsibilities embodied in the commitment extended to Petitioner as an inducement to participation in the "Voluntary Disclosure Program." Therefore, Respondent's suggestion of a collateral attack upon "lawful" agency investigations is incorrect. Petitioner merely asks this Honorable Court to recognize its right to enforce a commitment which Respondent in large part admits entering into, and which the Respondent has now breached.

Respondent has likewise chosen in its Statement of Facts to mis-characterize Petitioner's suit as a pre-enforcement attack upon agency investigations, rather than that which it truly is, a suit to enforce a governmental promise. In so doing, Respondent takes certain unwarranted liberties with the Record which require further correction by Petitioner.

In its narrative Statement, Respondent refers to portions of a May, 1976, Report from the SEC to a Congressional Committee which it claims details the history of the "Voluntary Disclosure Program" and the imputed knowledge of all participants therein. Respondent mischaracterizes the Report.[1] More importantly, Respondent fails to advise this Court that the Report referred to by it was issued four months *after* Petitioner entered into the agreement of confidentiality with the SEC, at a time when all of the participants, including the SEC, were still feeling their way to a *modus operandi* for the program.[2]

Respondent then broadly summarizes the meeting between Petitioner and the SEC in January of 1976 at which time Petitioner was induced to participate in the Voluntary Disclosure Program pursuant to assurances of confidentiality. Though contrary to the Record, Respondent nonetheless claims that it,

1. Respondent fails to disclose that the SEC changed its policy and decided to disclose information submitted to it under the Voluntary Disclosure Program—compare SEC FOI Release No. 11 (John A. Jenkins, June 11, 1975) with the cited footnote on page 9 of the Report. Moreover, the Respondent's quote applies only to the possibility of *domestic* payments, as the entire excerpt from the Report shows (Footnote 6, p. 8):

> "Although the Voluntary Disclosure Program was originally conceived to apply only to foreign payment problems, in practice it has been applied to disclosures of certain domestic problems as well. In addition to requiring appropriate disclosure under the federal securities laws, the Commission refers matters that appear to represent violations of domestic law to the appropriate law enforcement authorities."

2. Respondent would now have this Court believe that the Voluntary Disclosure Program was designed to cause SEC registrants to meet their disclosure *obligations,* by disclosing *material* facts. This is not the way the Program was presented to Petitioner or others. SEC Commissioner Sommers recommended on June 24, 1975, a balanced pattern of disclosure of payments to foreign nationals, without identifying "names of recipients and countries," since the results of such disclosure could be "horrendous" including "in some cases, perhaps even loss of life." These disclosures should be made even if not material "as a matter of good corporate relations." Loomis further admitted, in a letter to Congressman Nix (August 5, 1975), that "we have never determined that such disclosure is generally required, particularly as to past transactions."

rather than Dresser, received a commitment which was subsequently breached. With feigned indignation, Respondent asserts that it, and not the Petitioner, has been wronged. Petitioner respectfully suggests that this misleading and patently inaccurate recitation of the events underlying the present litigation constitutes a further subterfuge designed to avoid a fair consideration of Respondent's unlawful conduct.[3] Petitioner is therefore constrained to point out the foregoing inaccuracies so that this Honorable Court may have a clear understanding of those matters in issue.

In its argument, Respondent contends that its dealings with the Petitioner have been in accord with its statutory mandate. Respondent suggests that it may at its discretion, and without fear of judicial interference, infringe the rights of its citizenry and disregard all moral and legal obligations under the pretext of legislative purpose. Indeed, Respondent suggests that an agency, vested with extensive (and often unrestrained) investigative powers, may utilize its statutory authority to unlawfully pursue its lawful purpose without risk of judicial sanction. Petitioner respectfully submits that the law of this court does not grant to government agents immunity from such conduct in excess of lawful authority. Petitioner further suggests that the Freedom of Information Act, to the extent that it may be construed to authorize the executive branch to endanger the lives of American citizens abroad, denies to those citizens their rights

3. No court thus far has permitted Petitioner the opportunity to prove the existence and extent of Respondent's commitment. All rulings below have been in the context of motions pursuant to FRCP 12(b) and summary subpoena enforcement proceedings. Nonetheless, the SEC even admits the existence of an agreement concerning confidentiality in the affidavit of Barbara Brandon. In this affidavit Ms. Brandon states:

> "The [SEC] staff agreed to conduct an initial review of such documents on the premises of Dresser's counsel, and that any notes taken at that time would not include the names of individuals or foreign countries."

Although this does not state the full scope of the agreement, even this commitment was subsequently repudiated by the staff.

under the Fifth Amendment to the Constitution. Yet it is clear that such conduct in the present case has and continues to go unthwarted. Thus far, Respondent has successfully avoided effective judicial scrutiny of its conduct by utilization of its subpoena power and those statutory protections which shield it from judicial review. Indeed, the Respondent's commitment of confidentiality has all but been forgotten by reason of this subterfuge.

In an attempt to ameliorate the repudiation of its prior commitment, Respondent suggests that Petitioner's employees threatened by imminent public disclosure of that sensitive information compiled by Petitioner under governmental assurances of confidentiality would receive notice of any release of such information shortly before its actual release. By this accommodation, Respondent suggests that Petitioner's overseas employees and their families would be adequately protected from any threat of harm resulting from the disclosure of that confidential information in question. Respondent's suggestion, if indeed serious, evidences a startling lack of awareness of global turbulence manifest in the ever present threat of harm to U. S. citizens abroad. Apparently unable to avert disclosure under the Freedom of Information Act 5 U. S. C. § 552(a), Petitioner's employees and their families, by virtue of Respondent's repudiation of its commitment, live under constant threat of harm from the precipitous disclosure of that information compiled by Dresser under assurances of confidentiality. Respondent nonetheless suggests that, for its part, notice prior to disclosure will justify it dismissing its responsibility for all prospective consequences.

Respondent further justifies a repudiation of its prior commitment by suggesting that the Petitioner was perhaps unwise, or possibly naive, in accepting assurances from an agent of the government who may not have been vested with authority to commit Respondent to the preservation of the confidentiality of that information compiled by Petitioner under the Voluntary

Disclosure Program.[4] Respondent further suggests that no governmental agent, regardless of his position, has authority to "waive the agency's statutory authority to investigate violations of law." Again, Respondent engages in a distortion of the Record. Petitioner does not claim that immunity from further investigation or prosecution was guaranteed by Respondent. The commitment provided by Respondent was one of confidentiality, and only when Respondent elected to disavow this commitment was Petitioner compelled to seek judicial assistance. Yet premised upon its liberal mis-characterization of its commitment, Respondent disavows any obligation to Petitioner by voicing approval of the Fifth Circuit caveat that one who deals with the government does so at his own risk. Respondent therefore excuses its misconduct by raising a claim of bureaucratic indiscretion, the consequences of which will ultimately be borne by Petitioner's employees and their families. Respondent's contention notwithstanding, a disclaimer of responsibility and a gratuitous warning against dealing with the government cannot excuse Respondent's dishonor of its commitment. Clearly, the government cannot simply ignore conduct of its agents which jeopardizes the well-being of U. S. citizens. The government must remain accountable in such instances regardless of agency disclaimers of responsibility. Petitioner therefore respectfully suggests that Respondent's disavowal of its commitment cannot preclude Petitioner from seeking and obtaining judicial relief in enforcing Respondent's commitment of confidentiality.

Respondent also contends that Petitioner does not have standing to assert the rights of its employees and their families under the Privacy Act, 5 U. S. C. § 552(a). Because Petitioner is a corporation without statutory rights under the Privacy Act, Respondent concludes, as did the court of appeals, that Petitioner may not represent its employees even though they may be

4. No court has thus far entertained proofs on the question of agency authority. It may well be that Respondent's agent retained the authority to bind Respondent.

otherwise unable to assert their own rights under the Act. Petitioner again states that it does not claim a corporate right under the Privacy Act. Petitioner does however claim a right to protect its employees and their families by acting on their behalf and exhausting every possible means to prevent arbitrary disclosure of that confidential information which the Petitioner, as well as 400 other corporate entrants into the Voluntary Disclosure Program, compiled pursuant to governmental assurances of confidentiality. It cannot be denied that Petitioner, although itself without specific statutory rights, may nonetheless assert the rights of others whom it adequately represents. Petitioner, therefore, suggests that it is entitled to represent its employees and their families in asserting their individual rights as guaranteed under the Privacy Act.

CONCLUSION.

WHEREFORE, by reason of the conflict between the decision of the Court of Appeals for the Fifth Circuit and the decisions of this Court and the several circuits, Dresser prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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